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## Civil Rights are Civil Rights are Civil Rights: The Inapplicability of Preclusion to Unreviewed State Administrative Decisions

Heather Rutland

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**Civil Rights are Civil Rights are Civil Rights:  
The Inapplicability of Preclusion to Unreviewed  
State Administrative Decisions**

**Heather Rutland\***

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## I. INTRODUCTION

Consider the state agency that, after the passage of significant pieces of federal civil rights legislation, begrudgingly hires its first female employee, Nancy. Nancy expects some hostility and resentful attitudes from her coworkers—after all, this agency is located in a state that has been slow to recognize the non-domestic capabilities of women in general, and therefore, reluctant to integrate women into its workplace. What Nancy does not expect, however, are the overt and graphic sexual comments made at her expense. Amidst the retaliatory verbal abuse, she is constantly “encouraged” to resign, or face even more retaliatory verbal abuse. Nancy knows that she was fortunate to land a job in this elite and exclusionary agency department, and consequently, strengthens her resolve to stay despite the daily threats and innuendoes. One coworker in particular, however, is relentless in his efforts to humiliate and antagonize Nancy, and she soon finds her resolve weakening. She decides to keep a record of each transaction with this individual, in the hope of eventually pursuing sexual harassment claims against him.

After a few months, Nancy consults an attorney who applauds her diligent efforts at documenting the harassment, and promptly files a grievance with the appropriate state agency. At the administrative hearing, the attorney presents what he presumes to be the smoking gun: Nancy’s detailed account of the harassment. Yet, de-

spite the smoking gun, Nancy's log is countered by the entire department's testimony that such harassment never took place and that Nancy fabricated each and every purported interaction. One by one, Nancy's coworkers take the stand to testify to the innocence of the accused individual and the absurdity of Nancy's claims. The agency's administrative law judge listens to the evidence and rules in favor of the agency. Nancy loses and the agency is affirmed in its discriminatory actions.

Disturbed, Nancy's attorney realizes that there are certain political and philosophical realities surrounding the agency judge's decision and decides against appealing at the state court level. Instead, the attorney files a Title VII discrimination claim in federal court. One problem looms: Will Nancy's federal civil rights claim be precluded as a result of the unreviewed state administrative judge's decision?

If Nancy's claims are precluded, her employer enjoys a virtually airtight collateral estoppel defense.<sup>1</sup> Nancy, along with any other complainant who loses at the state agency level, is therefore unable to look to the federal courts for enforcement of her federal rights,<sup>2</sup> and her otherwise paramount civil rights become a subsidiary concern to that of administrative efficiency.<sup>3</sup>

Administrative agencies exist to promote efficiency in government.<sup>4</sup> Despite the utility of administrative proceedings, the im-

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1. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991) (predicting the effects where state agency determinations are given preclusive effect).

2. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 494 (1982) (Blackmun, J., dissenting) (explaining that the *Kremer* ruling forecloses the possibility of Title VII relief). After an adverse administrative determination, the only possible remedy lies in state judicial review, contrary to the Congressional intent behind Title VII. *Id.* at 494 (Blackmun, J., dissenting) (describing the ramifications of the *Kremer* Court's ruling). *Cf. Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 111 (declaring subsequent federal proceedings "strictly pro forma" if state administrative agency findings enjoyed preclusive effect).

3. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (concluding that both Title VII and the Age Discrimination in Employment Act of 1967 (ADEA) contain provisions "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings"). *But see* CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW* xi (1990) (remarking that there is no constitutional, statutory, or common-law guarantee that administrative agencies will make good decisions).

4. Marjorie A. Silver, *In Lieu Of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367, 375-76 (1990) (providing background on the purpose of agency adjudications). Professor Silver goes on to note that many disputes which would otherwise form the basis of successful civil rights suits can be resolved at the local agency level. *Id.* at 375-76 (noting the benefits of the administrative process). *See also* Erika Geetter, *Attorney's Fees For § 1983 Claims in*

portance and necessity of administrative tribunals must also be examined in light of the atavistic concern the agency has in the outcome of each case before them.<sup>5</sup> Administrators, whose function includes administering and implementing a stated legislative purpose, make administrative determinations, not judges.<sup>6</sup> Administrative Law Judges (ALJs), therefore, do not adopt the judicial attitude of impartiality, but "rather the attitude of an executive who wants to get a job done."<sup>7</sup> Every search for the truth, and every effort at compensating the wronged party must be tempered toward accomplishing the agency's legislative charter.<sup>8</sup> To this end, some agencies have evidenced everything from antipathy to outright discouragement of participation by outside counsel.<sup>9</sup> Simply put, agencies are parties in interest to the very proceedings they conduct.<sup>10</sup>

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*Fair Hearings: Rethinking Current Jurisprudence*, 55 U. CHI. L. REV. 1267, 1273 (1988) (demonstrating that various claims traditionally raised in state agency fair hearing proceedings may also serve to support § 1983 actions).

5. Randy J. Hart, Note, *Administrative Res Judicata in Ohio: A Suggestion For the Future*, 37 CLEV. ST. L. REV. 595, 605 (1989) (acknowledging judiciary's fear of institutional bias conflict in administrative proceedings). See also FRANK E. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 20-21 (1982) (relating the potential for agency "excess of zeal" over its own interests to conflict with concerns of fairness and impartiality); ROBERT L. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 264 (1979) (noting that administrative agencies must act as both a legislative and adjudicatory power).

6. Hart, *supra* note 5, at 619 (explaining that because state agencies do not address the same policy concerns as the judiciary, their decisions are likewise based on different standards). See also COOPER, *supra* note 5, at 223 (distinguishing judicial decision-making from that of administrative tribunals).

7. COOPER, *supra* note 5, at 223 (recognizing that while administrative judges use the same tools as their judicial counterparts, they utilize these tools in vastly different ways). See also EDLEY, *supra* note 3 (contrasting the procedural aspects of administrative adjudication with its substantive effects).

8. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 335 (1991) (describing policy-making by courts as incidental to the decisions of the cases, unlike the policy-making objectives of agencies). See also RABIN, *supra* note 5, at 264 (noting that the administrative agency's unique task is to both make rules and to decide cases); COOPER, *supra* note 5, at 223 (recognizing that in light of their legislative imperatives, "agencies must depart from the normal standards of decision that guide the courts"). "This dual capacity creates a real tension . . ." RABIN, *supra* note 5, at 264 (discussing the realities involved when an administrative agency seeks to both legislate and adjudicate).

9. COOPER, *supra* note 5, at 221 (characterizing the resentment some agencies harbor toward assistance of counsel in light of the agency's professed expertise in the disputed area). See also SILVER, *supra* note 4 at 376 (expressing concern over the fact that many litigants in agency proceedings are not represented by counsel).

10. Bruff, *supra* note 8, at 334-35 (arguing that administrative law de-emphasizes the importance of a neutral tribunal). The tension inherent in administrative law between the need for expertise and the "introduction of unacceptable levels of bias"

The agency's conflict of interest is further underscored by the broad scope of discretion afforded to ALJ's.<sup>11</sup> The trend in agency decision-making has seen an increase in the use of the "fair" or "reasonable" paradigm, also known as "administrative absolutism."<sup>12</sup> This rule of discretion is particularly troubling in light of the seeming lack of controls used to determine what in fact is "fair" or "reasonable."<sup>13</sup>

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into the adjudicatory process has existed for centuries, and is not likely to end soon. *Id.* at 334 (addressing the need for balance within the administrative adjudicatory process). See also COOPER, *supra* note 5, at 21 (noting that the fundamental differences between administrative and judicial procedures are due to the fact that agencies are normally parties in interest to the proceedings).

11. COOPER, *supra* note 5, at 21 (examining the role of administrative discretion in agency adjudications). See also EDLEY, *supra* note 3, at 5 (intimating that administrative agency discretion is far more sweeping than traditional executive discretion). The deference afforded an agency determination is never more dramatic than when considered in a military context, where the military's important mission is often used to justify otherwise impermissible civil rights violations. *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (refusing to overturn Air Force discharge of rabbi for wearing his yarmulke indoors in violation of military headgear standards).

12. COOPER, *supra* note 5, at 21 (explaining the administrative decision-making process and its tendency toward substituting the administrative law judge's discretion for the rule of law).

13. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that courts must follow any reasonable agency interpretation of statutes administered by that agency); COOPER, *supra* note 5, at 21 (emphasizing that agencies are often the sole arbiters of what constitutes reasonableness or fairness in the specific instance); EDLEY, *supra* note 3, at 5 (criticizing the enormous policy and law-making powers of "unelected bureaucrats"). In addition, there is a tendency to settle all procedural disputes according to considerations of the agency's convenience. COOPER, *supra* note 5, at 23 (demonstrating the role agency priorities play in adjudications). Even more prejudicial to the non-agency party is the fact that each decision is made according to the individual and unique merits of the case, permitting frequent and substantial departures from previous decisional precedence in the interest of expedience. *Id.* (noting the lapses in predictability that often occur in the administrative context). The judiciary is locked in a perpetual struggle to determine exactly how much deference is due an agency decision, with case law increasingly littered with exceptions to the reasonable interpretation rule. Accord Timothy B. Dyk & David Schenck, *Exceptions to Chevron*, ADMIN. L. NEWS 1993, at 1 (distinguishing three broad categories for judicial interpretation exceptions to the traditional rule of reasonable agency interpretation: 1) exceptions that ensure that the judiciary does not defer to an agency on an issue actually within the scope of judicial power, 2) exceptions when Congressional intent demonstrating desired judicial deference to agency decisions is lacking, and 3) exceptions that prevent courts from deferring to agency decisions that appear to have been motivated by expediency, rendering them less than trustworthy). These three post-*Chevron* bases for judicial deference exceptions appear, however, merely to be reincarnations of established judicial deference doctrine, specifically judicial deference to executive actions. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992) (listing factors to be considered by courts, including support for agency's decision in statute's language and history, the agency's authority to promulgate regulations, the consistency of the agency decision as compared to previous agency pronouncements, the technical com-

This Comment addresses the history and intent behind administrative law and agency decision-making, and examines the differences between administrative proceedings and their judicial counterparts. Part II explains the history and effect of claim preclusion. Part III discusses the foundations of Administrative Law. Part IV reviews the Supreme Court's treatment of the preclusive effects of unreviewed agency determinations in civil rights cases, with particular focus on civil rights cases arising under Title VII, the ADEA, and § 1983. Part V addresses the necessity and importance of judicial review of administrative agency findings. Part VI reviews the history and purpose of the civil rights movement. Finally, Part VII argues that the three statutes should be treated equally for preclusion purposes in light of the original Congressional intent of upholding civil rights and the continuing importance of civil rights enforcement. Specifically, this Comment proposes that each unreviewed § 1983 administrative adjudication receive protection under the same umbrella as its constitutional cousins, Title VII and the ADEA, and exempt these adjudications from preclusive effects in subsequent federal proceedings.

Because of Congress's increased reliance on administrative adjudication to resolve civil rights-related disputes, concerns arise about the applicability of claim and issue preclusion principles to this still emerging area of the law.<sup>14</sup> Claim preclusion is the judicial method used to confirm that a litigant had his or her day in court, and the court fully adjudicated his or her claim.<sup>15</sup> Because admin-

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plexity of the subject, and whether the decision was founded on the agency's expertise in the technical field).

14. *E.g.*, *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 113-14 (ruling that unreviewed state agency age discrimination decisions are not entitled to preclusive effect); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798-99 (1986) (awarding preclusive effects to fact finding of unreviewed state administrative tribunals in § 1983 actions, but declining to impose such a limitation on Title VII discrimination claims); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) (affirming district court's grant of preclusion to judicially reviewed agency decision rejecting employee's Title VII discrimination claim); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762 (1979) (declaring that "state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy" in support of its holding that unreviewed ADEA determinations do not preclude subsequent federal claims).

15. *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (naming traditional principals behind claim preclusion: saving parties cost of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication by preventing inconsistent decisions). *See also* *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980) (stating that "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote comity between state and federal courts that has been recognized as a bulwark of the federal system").

istrative agencies often have narrow legislatively defined jurisdictional authority, blanket application of claim preclusion to unreviewed administrative decisions is especially unwise.<sup>16</sup>

Of the enormous body of administrative law, one area spawning considerable controversy is the claim preclusion effect of unreviewed state administrative decisions.<sup>17</sup> Three common subjects of dispute and confusion are the Age Discrimination in Employment Act of 1967 (ADEA), Title VII, and 42 U.S.C. § 1983.

In *University of Tennessee v. Elliott*,<sup>18</sup> the United States Supreme Court examined the issue-preclusive effects of unreviewed state administrative Title VII and § 1983 decisions.<sup>19</sup> The *Elliott* Court held that Congress did not intend Title VII administrative decisions to have issue-preclusive effects in federal court in light of the language directing the Equal Employment Opportunity Commission (EEOC) to give "substantial weight" to the decisions of state or local authorities.<sup>20</sup> The *Elliott* Court also considered 28 U.S.C. § 1738, the full faith and credit statute guaranteeing adjudications by state courts the same deference in federal courts as that enjoyed

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16. *Accord* *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (articulating three fairness requirements for unreviewed administrative decisions: first, the administrative agency acted in a judicial capacity; second, the agency resolved issues properly before it; and third, the parties had an adequate opportunity to litigate); Silver, *supra* note 4, at 375 (listing agencies that, while not allowed to hear actual civil rights claims, are allowed to make determinations that may impact an individual's civil rights). "Such agencies include . . . unemployment compensation boards and disciplinary boards that determine whether an individual was dismissed from employment for cause[,] . . . school disciplinary boards that determine whether a student should or should not be suspended or expelled from school[,] . . . licensing boards that determine whether the license of a professional (or driver) should be revoked." *Id.* (explaining how agencies not actually charged with enforcing civil rights nevertheless make decisions impacting them).

17. *E.g.*, *Lead Indus. Ass'n v. Envtl. Prot. Agency*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980) (stating that "a reviewing court owes no deference to the agency's pronouncement on a constitutional question"); *Porter v. Califano*, 592 F.2d 770, 780-81 (5th Cir. 1979) (holding that a court must make an independent judgment on the constitutionality of an agency's actions, regardless of the agency's expertise in that area); Kelly E. Henriksen, *Gays, The Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1281 (1996) (noting that discretion may not be conferred on an agency by Congress if it results in violations of an individual's constitutional rights).

18. 478 U.S. 788 (1986).

19. *Id.*, at 788 (considering claim preclusion as applied to Title VII and § 1983 claims).

20. *Id.* at 795 (declaring that it would be nonsensical for Congress to award more power to administrative agency decisions than to EEOC).



in a state's own courts.<sup>21</sup> Title 28 U.S.C. § 1738 was deemed applicable in only those instances where the statutory language did not indicate Congressional intent to the contrary.<sup>22</sup> Unlike the language of Title VII, the *Elliott* Court determined that § 1983 of the civil rights act evinced no Congressional intent to contravene the federal common-law rules of issue preclusion.<sup>23</sup>

Notwithstanding, however, the Supreme Court's ruling in *Elliott*, wherein the Court held that the fact finding results of unreviewed state administrative agencies did not have preclusive effect in subsequent Title VII claims, but did have such preclusive effects on claims brought under Reconstruction civil rights statutes,<sup>24</sup> the circuit courts remain split as to whether claim preclusion applies to unreviewed administrative agency decisions.<sup>25</sup> Subsequently, crea-

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21. *Miagra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (obligating federal courts to grant state court decisions claim preclusion effect).

22. *Id.* at 797 (recognizing Congressional intent to apply federal common-law claim preclusion principles to § 1983 actions).

23. *Id.* (quoting *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980)). *But see* Robert P. Morris, *How Many Bites Are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott*, 55 TENN. L. REV. 205, 245-48 (1988) (arguing that the general rule of preclusion fashioned by the *Elliott* Court directly contradicts the Court's finding that § 1738 is inapplicable to § 1983 claims). Morris notes that the requirements listed in *Elliott* that supposedly prompt application of federal common-law administrative preclusion are essentially the same conditions imposed under § 1738, which the Court deemed inapplicable to § 1983 claims in light its of statutory construction. *Id.* (paralleling § 1738 conditions for preclusion with those created after § 1738 was ruled inconsistent with Congressional intent).

24. *Elliott*, 478 U.S. at 799 (affirming in part and reversing in part the Court of Appeals decision).

25. *Compare* *DeSario v. Thomas*, 139 F.3d 80, 87 (2d Cir. 1998), *vacated*, *Slekis v. Thomas*, 525 U.S. 1098 (1999) (declining to impose an exhaustion requirement on § 1983 claims that would force claimants to bring all claims before state administrative official or risk claim preclusion); *G.V.V. Rao v. County of Fairfax Virginia*, 108 F.3d 42, 45-46 (4th Cir. 1997) (refusing to give preclusive effect to unreviewed administrative Title VII decision); *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987) (holding that because the state administrative agency was not the proper forum to hear ADEA claims, claimant's failure to litigate ADEA claim did not act to bar future federal causes of action); *Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1297 (7th Cir. 1987) (declining application of preclusion principles to unreviewed ADEA-based administrative adjudications); *Rosenfeld v. Dep't of the Army*, 769 F.2d 237, 240 (4th Cir. 1985) (holding that judicially unreveiwed state administrative agency decisions should not be accorded preclusive effect to subsequent federal claims), *with* *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994) (applying federal common-law claim preclusion to § 1983 decisions); *Stillians v. Iowa*, 843 F.2d 276, 282-83 (8th Cir. 1988), *abrogated*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (giving unreviewed state administrative decisions preclusive effect under the ADEA); *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1283 (9th Cir. 1986), *abrogated*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (allowing that judicially unreviewed administrative decisions may enjoy preclusive effects under language of ADEA).

tion of a coherent and cohesive rubric for uniform application failed in light of the perceived differences between both the statutes' purposes and their legislative intent.<sup>26</sup>

## II. CLAIM PRECLUSION: WHAT IS IT AND WHEN DOES IT APPLY?

The general rule of claim preclusion is that a judgment on the merits in one suit bars a subsequent suit between the same parties based on the same cause of action.<sup>27</sup> Though closely related,<sup>28</sup> issue preclusion prevents relitigation of issues that were both fully determined and necessary to the outcome of the earlier proceeding.<sup>29</sup> Under a strict interpretation, claim preclusion is often con-

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26. *Accord Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 109-10 (noting that the suitability of claim preclusion varies according to the specific rights at stake, the power of the administrative agency, and the adequacy of agency procedures); *Elliott*, 478 U.S. at 795-96 (citing *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) in support of the *Elliott* Court's interpretation of Title VII legislative intent, but citing *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980) in support of the absence of such § 1983 legislative intent). Compare *Duggan*, 818 F.2d at 1296 (finding enough parallels between Title VII and the ADEA to treat them identically for preclusion purposes), with *Stillians*, 843 F.2d at 281 (allowing that "the ADEA more closely parallels Title VII than § 1983" when considering the preclusive effects of unreviewed state administrative ADEA determinations).

27. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (defining the doctrine of claim preclusion). Phrased differently, precluding a claim means "that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he has prosecuted such a claim, whether or not the two claims wholly correspond to each other." RESTATEMENT (SECOND) OF JUDGMENTS § 1 (describing the prohibitive nature of claim preclusion). See also *Parklane Hosiery*, 439 U.S. at 326 (discussing the effects of judgments on original and counter claims, as well as the scope of claims).

28. The two terms are often used interchangeably (and incorrectly) by courts and practitioners alike. RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982) (noting that the liberal use of the term *res judicata* has led to its persistent misuse). However, both claim and issue preclusion "shar[e] the common goals of judicial economy, predictability, and freedom from harassment . . ." *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988), citing *Ruth Bader Ginsburg, The Work of Professor Allan Delker Vestal*, 70 Iowa L. Rev. 13, 20 (1984) (explaining the close relationship between the preclusion doctrines).

29. *Parklane Hosiery*, 439 U.S. at 326 n.5 (distinguishing issue preclusion because the subsequent claim is based on a separate cause of action, despite the shared issues in controversy). An interesting variation on queries of administrative preclusion can be seen in a case to which the United States Supreme Court recently remanded. *Cleveland v. Policy Mgmt. Sys. Corp.*, 120 F.3d 513 (5th Cir. 1997), cert. granted in part by 525 U.S. 808 (1998), and vacated by 526 U.S. 795 (1999), on remand to 195 F.3d 803 (5th Cir. 1999). On remand from the United States Court of Appeals for the Fifth Circuit, *Cleveland* involved an employee (*Cleveland*) of Policy Management Systems Corporation (PMS) who took a leave of absence after suffering a stroke while on the job. *Cleveland*, 120 F.3d at 514 (describing the events giving rise to the litigation).

sidered the more drastic of the two preclusion doctrines because it forces plaintiffs to raise all possible claims for relief and all desired remedies in the initial proceeding.<sup>30</sup> Before a court will impose this

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As a result of her stroke, Cleveland suffered from aphasia and had difficulty with her concentration, memory, speaking, reading, and spelling skills. *Id.* Because of her inability to work, Cleveland applied for and received social security disability benefits until her eventual return to work. *See id.* Upon returning to PMSC, Cleveland requested various accommodations as she was not yet fully recovered, including "computer training, permission to take work home in the evenings, [and] a transfer of position" each of which PMSC denied. *Id.* at 515. Three months after her return to work, Cleveland was terminated for poor performance, causing her to become depressed and aggravating her aphasia, both of which prompted her to renew her request for social security disability benefits. *Id.* The Administrative Law Judge (ALJ) reviewing the request concluded that Cleveland was disabled at the time of her stroke and remained so at the time of the ALJ's decision, and was, therefore, entitled to disability benefits retroactive to the date of the stroke. *Cleveland*, 120 F.3d at 515 (reporting ALJ's determination of Cleveland's claims). Before the ALJ rendered the decision, Cleveland filed a claim of wrongful termination under the Americans with Disabilities Act against PMSC, alleging that she was a qualified individual with a disability who was denied reasonable accommodations necessary to allow her to perform her essential job functions. *Id.* The *Cleveland* court noted that the ADA requires an employee to be able to meet the requirements of their specific position, while the SSA requires that the person be completely unable to work. *Id.* at 517 (comparing requisite levels of incapacitation of the SSA and ADA statutes). Judge Wiener, writing for the Court of Appeals, said that while a social security disability claim does not entirely preclude a cause of action based on the ADA, the social security claim does create a rebuttable presumption. *Id.* at 518 (hesitating to apply a blanket rule of judicial estoppel to Cleveland's claim). *But see* *Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104, 108-09 (6th Cir. 1997) (holding that a plaintiff's claims under the SSA prevent future claims under the ADA); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617-18 (3d Cir. 1996) (estopping plaintiff from asserting ADA claim in light of prior social security request); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996) (basing judicial preclusion estoppel on plaintiff's previous assertion that she was unable to work); *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (using plaintiff's complete disability claim to estop subsequent accommodations denial claim); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (treating social security disability application as binding admission of employee's status, thus eliminating the need to revisit the issue); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 771 (8th Cir. 1987) (refusing to allow plaintiff who had admitted an inability to perform essential job functions a claim for relief under the Federal Rehabilitation Act). The Fifth Circuit ruled that Cleveland failed to raise a genuine issue of material fact sufficient to rebut the presumption of her inability to work created by her SSA claim, thereby estopping her from pursuing her ADA claim. *Cleveland*, 120 F.3d at 518 (enforcing judicial preclusion principles in the absence of an adequate rebuttal). In *Cleveland*, 526 U.S. 795 (1999), the Supreme Court held that: (1) claims for Social Security Disability Insurance (SSDI) benefits and for ADA damages did not inherently conflict; and (2) the employee was entitled to an opportunity to explain a discrepancy between her statement in pursuing SSDI benefits that she was totally disabled and her ADA claim that she could perform essential functions of her job.

30. RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982) (contrasting the effects of claim preclusion with issue preclusion); 18 STEVEN WRIGHT, ET AL, FEDERAL PRACTICE AND PROCEDURE § 4408, at 64-65 (1981) (comparing claim and issue pre-

severe consequence, however, claim preclusion requires that the litigant have a full and fair opportunity to litigate any and all potential claims.<sup>31</sup>

Additionally, Congressional intent plays a role in whether a federal court will preclude a claim.<sup>32</sup> Many statutes require complainants first to file a claim with the appropriate agency authority before allowing the claim to be heard in federal court.<sup>33</sup> The preclusive effect of the agency's administrative decision becomes an issue when the claimant either chooses to forego review by a state district court, or there is no such judicial review available.<sup>34</sup>

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clusion doctrines). *See also* *Tonka Corp. v. Rose Art Indus., Inc.*, 836 F. Supp. 200, 210 (D.N.J. 1993) ("[t]he term *res judicata* has been given a variety of meanings, some of which incorporate the distinct concept of collateral estoppel").

31. RESTATEMENT (SECOND) OF JUDGMENTS § 26, cmt. c (1982) (recognizing the inherent unfairness of penalizing a litigant for failure to seek unified disposition when the claims could not, in fact, have been combined due to jurisdictional limitations). *See also* *Utah Constr.*, 384 U.S. at 418-19 (declaring as final only those agency determinations made within the scope of the agency's authority).

32. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (revealing that "the question is not whether administrative estoppel is wise but whether it is intended by the legislature"); *Elliott*, 478 U.S. at 793-97 (rejecting assertion that Congress intended federal courts to be bound by administrative Title VII decisions, but fashioning a rule of preclusion in the absence of legislative intent to the contrary).

33. 29 U.S.C. § 626(d) (1982) (requiring grievants to first file discrimination claims arising under the ADEA with the EEOC). *See also* *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 469 (1982) (allowing an aggrieved party to present his or her case before the EEOC only after allowing the appropriate state agency to first attempt resolution); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 (1979) (ruling that under the ADEA, resorting to available administrative agency remedies is mandatory and not optional for claimants alleging age discrimination). It is only after complying with such remedy exhaustion requirements that a claimant may file a state or federal claim. 29 U.S.C. § 633(a)(d) (1994) (requiring hearing before appropriate agency before filing claim in federal court). States differ in terms of their deferral status; in a deferral state, the state administrative agency responsible for handling employment discrimination adjudicates the claim. 29 C.F.R. § 1626.9 (1988) (authorizing referral of civil rights-based claims to and from state agencies). In a non-deferral state, the EEOC hears the claim because the state does not have an adequate state agency. 29 U.S.C. § 626(d) (1982) (providing that termination of proceedings with the appropriate state agency allows the claim to proceed to the federal administrative level). Regardless of a state's deferral status, there is at least a sixty-day (60-day) investigatory period, during which time the claimant is prohibited from filing a civil action in state or federal court. 29 U.S.C. § 626(c)(1) (1982) (mandating a waiting period to allow for administrative investigation). If the EEOC (in non-deferral states) initiates litigation, the claimant loses the right to file suit entirely. 29 U.S.C. § 626(d)(1) (showing that if the federal administrative agency decides to pursue the claim on the plaintiff's behalf, that plaintiff may lose all ability to enforce their civil rights).

34. *Accord Kremer*, 456 U.S. at 469 (recognizing that no portion of Title VII operates to force claimants to pursue an unfavorable state administrative decision in state court); *Assoc. Builders and Contractors, Inc. v. Irving*, 610 F.2d 1221, 1224-25 (4th Cir. 1979) (ruling National Labor Relations Board's refusal to file complaint un-

### III. ADMINISTRATIVE LAW

#### A. *Legislative Intent: Definition and Goals of Administrative Law*

Administrative law is the legal branch that controls the administrative functions of the government by ensuring that agencies exercise their powers within their legal limits, while additionally protecting citizens against any abuse of agency powers.<sup>35</sup> Congress and state legislatures promulgate and define the administrative agency as strictly a legislative creature,<sup>36</sup> "including all those branches of public law relating to the organization of governmental administration."<sup>37</sup> Therefore, any regulatory or rulemaking authority is derived solely from the agency's legislative mandate.<sup>38</sup>

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reviewable). "When administrative action is fully reviewable, a court may decide questions of (1) constitutionality, (2) jurisdiction, (3) fraud on the tribunal, (4) arbitrariness or capriciousness, (5) legality, and (6) substantial evidence to support findings of fact . . . ." 5 KENNETH C. DAVIS & JOHN P. WILSON, *ADMINISTRATIVE LAW TREATISE* 257 (2d ed. 1984) (listing the issues prompting judicial review of administrative tribunal determinations). Davis points out the common misconception by the courts that reviewability is a distinct, static concept. *Id.* at 258 (explaining that despite jurisdictional or other traditional bars to review, a court may elect to allow judicial review of an agency decision on a specific, compelling question). Courts may elect to carve out review categories for otherwise unreviewable administrative determinations. *Id.* (sampling potential exceptions to unreviewable determinations, such as "unreviewable except on constitutional . . . questions" or "unreviewable unless clearly arbitrary or beyond the agency's jurisdiction"). *Cf.* JEFFEREY L. JOWELL, *LAW AND BUREAUCRACY* 28 (1975) (recognizing that the existence of a right does not guarantee that it will be given adequate protection). Jowell further notes:

A welfare recipient, for example, who has the procedural right to appeal the decision of a caseworker, might be told by the appeals referee that what she is asserting does not exist. In other words, she may be told through the exercise of her procedural right that in fact she has no substantive right.

JEFFEREY L. JOWELL, *LAW AND BUREAUCRACY* 28 (1975) (proffering an example demonstrating the defects of agency adjudication).

35. JOHN W. WADE, *ADMINISTRATIVE LAW* 5 (6th ed. 1988) (attempting to define the nebulous area of administrative law).

36. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 n.18 (1982) (recognizing Congress's power to create administrative agencies to aid in governance). *See also* *Bevans v. Indust. Comm'n*, 790 P.2d 573, 576 (Utah Ct. App. 1990) (declaring judicial review of statutorily created agency powers appropriate).

37. *Silver*, *supra* note 4, at 375-76 (explaining the purpose of agency adjudications); *COOPER*, *supra* note 5, at 4 (defining the scope and purpose of administrative law).

38. *Tex. v. Pub. Util. Comm'n*, 883 S.W.2d 190, 194 (Tex. 1994) (declaring that administrative agencies are legislative creations endowed with only the powers necessary to carry out their duties); BERNARD K. SCHWARTZ, *ADMINISTRATIVE LAW* 10 (3d ed. 1991) (explaining that agencies are restricted to activities explicitly or implicitly authorized by legislature). *Cf.* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986) (observing that Congress often legislates a

Likewise, any and all agency adjudicatory authority stems from the same legislative source.<sup>39</sup> The field of administrative adjudication is often viewed as including “little courts” and “little legislatures,” each acting in furtherance of the individual agency’s legislative orders.<sup>40</sup>

### *B. Benefits and Purposes of Administrative Adjudication*

One of the purported benefits of administrative agency law is the efficiency with which the agency is able to “polic[e] the minutiae . . . in designated field[s]” with a view toward preventing large-scale deviations from proscribed conduct.<sup>41</sup> Another inherent advantage to the administrative process is the agency’s continuity of experience and attention to specialized areas of regulation.<sup>42</sup> Furthermore, the relief administrative agencies provide to the court system is a motivating factor for expanding the scope of the agencies’ powers.<sup>43</sup> For example, agency adjudications provide an opportunity for parties to present evidence to a decision-making

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broad agency mandate such as “to clean up the environment, to monitor the banking system, or to improve worker safety”).

39. *N. Pipeline*, 458 U.S. at 67 n.18 (stating that “Congress’ power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies”).

40. MARTIN FORKOSCH, A TREATISE OF ADMINISTRATIVE LAW 204 (1956) (explaining that administrative agencies exist to effectuate the policies deemed important by the legislature); COOPER, *supra* note 5, at 4 (outlining the powers of administrative tribunals).

41. COOPER, *supra* note 5, at 14 (recognizing the government’s compelling need to have administrative agencies enforce its mandates).

42. *City of El Paso v. Pub. Util. Comm’n of Tex.*, 609 S.W.2d 574, 579 (Tex. Civ. App. 1980) (giving large degree of latitude to agencies created to centralize expertise in certain regulatory area); COOPER, *supra* note 5, at 15 (1982) (lauding the use of more flexible administrative agencies to react to changing social conditions); Silver, *supra* note 4, at 375-76 (admitting that the creation of agencies “allows development of expertise in the agencies’ particular fields”).

43. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (concluding that both Title VII and the ADEA “intended to screen from the federal courts those discrimination complaints that might be settled . . . in state proceedings”); *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932) (noting the “utility and convenience of administrative agencies for the investigation and findings of facts within their proper province”); COOPER, *supra* note 5, at 19 (recognizing the potential flood of litigation the court system would face if confronted with each and every workmen’s compensation claim or social security dispute); Silver, *supra* note 4, at 375-76 (acknowledging that agency expertise often means a “speedier resolution” of disputes than if left to the courts).

entity.<sup>44</sup> While Congress created the administrative animal to assist, it did not intend to replace the judicial system.<sup>45</sup>

The primary purpose of administrative adjudication is to allow a more expedient method for settling disputes than if the claim was heard in a court of law.<sup>46</sup> In effect, resolution at the administrative level is not only expedient and less expensive, but also allows state agencies the first opportunity to tackle state law-based disputes.<sup>47</sup> Administrative adjudication allows agencies to develop expertise in the agency's particular field,<sup>48</sup> but often at the expense of the formalities guaranteed in federal or state courts.<sup>49</sup> In addition, there are agencies whose primary concern is civil rights enforcement. However, there are far more agencies whose seemingly non-civil rights-based decisions can impact a party's civil rights.<sup>50</sup>

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44. Silver, *supra* note 4, at 375 (chronicling the steps in an agency adjudication and defining "agency adjudication" as "a process that more or less resembles judicial adjudication"). See also Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1274 (1975) (demonstrating the different procedural interpretations of a "hearing").

45. *Johnson v. Ry. Express Agency*, 421 U.S. 454, 461 (1975) (remarking on Congressional intent to allow victims of employment discrimination a choice between administrative and judicial remedies).

46. *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932) (emphasizing the benefits of administrative proceedings). See also COOPER, *supra* note 5, at 19 (recognizing the assistance that administrative proceedings provide the judiciary); Silver, *supra* note 4, at 375-76 (acknowledging that agency expertise often results in a "speedier resolution" of disputes).

47. Silver, *supra* note 4, at 376-77 (providing rationale for administrative mechanisms). See also Erika Geetter, Comment, *Attorney's Fees For § 1983 Claims in Fair Hearings: Rethinking Current Jurisprudence*, 55 U. CHI. L. REV. 1267, 1272-73 (1988) (arguing that claims successfully resolved at the state level need never materialize into § 1983 claims).

48. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991) (noting that "specialized judges can become expert in the . . . issues surrounding particular programs" and agencies are better able to "gather the necessary information and to send signals that will register"); Silver, *supra* note 4, at 375-76 (explaining that administrative agencies specialize in certain areas, facilitating resolution of disputes in these areas).

49. 42 U.S.C. § 2000e-5(b) (1982) (requiring agencies to first attempt to eliminate discrimination through "informal methods of conference, conciliation, and persuasion"); Silver, *supra* note 4, at 375-76 (disparaging administrative proceedings in civil rights cases because of their informality); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 499-500 (1987) (lambasting civil rights legislation for allowing violators to come into compliance with statutes using informal agency proceedings rather than providing true reparation of the claimant's injury through more formal judicial means).

50. Silver, *supra* note 4, at 375 (1990) (providing examples of agencies that make decisions impacting civil rights). For example, an employer who refuses to pay the claimant's desired workers' compensation benefits and successfully defends such withholding at an administrative hearing, precludes the plaintiff employee from bringing a

### C. Recognition of Administrative Adjudicative Power

In 1932, the Supreme Court of the United States' decision in *Crowell v. Benson*,<sup>51</sup> recognized the adjudicative powers of administrative agencies for the first time.<sup>52</sup> In *Crowell*, the Court permitted administrative determinations in cases involving individual rights and liabilities, as long as the legislature made provisions for judicial review.<sup>53</sup> The Court, however, was unwilling to give res judicata effect to administrative agency decisions.<sup>54</sup>

Prior to 1940, the Supreme Court viewed an administrative determination as an executive branch mechanism, consequently it was not a candidate for preclusion principles.<sup>55</sup> Prompted by a challenge to the constitutionality of the Bituminous Coal Conservation Act of 1935, the Court began to shift the treatment of administrative adjudications.<sup>56</sup>

The Supreme Court, in *Sunshine Anthracite Coal Co. v. Adkins*,<sup>57</sup> ruled in part, on the validity of an agency determination as to whether the appellant's mining activities fell under the provi-

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federal claim under § 1983. Geetter, *supra* note 4, at 1273 (concluding that an adverse administrative decision could serve as the state action basis for a § 1983 claim, but which would currently be precluded from federal court enforcement). Accord Morris, *supra* note 23, at 243-44 (demonstrating an instance where a the administrative outcome of a nonconstitutional grievance can have civil rights implications).

51. 285 U.S. 22 (1932).

52. *Id.* at 57.

53. *Id.* at 64-65 (granting administrative agencies jurisdiction to decide issues of liability among individuals, subject to any provisions for judicial review required by Congress). See also BERNARD K. SCHWARTZ, ADMINISTRATIVE LAW II (3d ed. 1991) (interpreting *Crowell* to stand for the proposition that agencies may act in a judicial capacity provided there is "the ultimate constitutional safeguard [of] judicial review"); PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (1994) (declaring the Administrative Procedure Act of 1946 (APA) the "fundamental charter of the administrative state"). The APA's design affords procedural protection to those with interests decided by agencies. *Id.* (terming the APA a "quasi-constitutional" statute, aimed at implementing Fifth Amendment due process safeguards); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 455 (1986) (likening the APA to a constitution because "today [it] means all kinds of things that its drafters could not possibly have intended . . .").

54. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1932) (holding preclusion principles applicable to administrative adjudications). See generally Hart, *supra* note 5, at 605 (reporting the effect of *Sunshine Anthracite* Court's decision).

55. *Pearson v. Williams*, 202 U.S. 281, 285 (1906) (declaring administrative agency decisions to be treated as executive branch decisions).

56. *Sunshine Anthracite*, 310 U.S. at 387 (characterizing the basic problem faced by the Court as "the Constitutionality of the Act").

57. 310 U.S. 381 (1940).



sions of the federal statute.<sup>58</sup> In *Sunshine Anthracite*, the National Bituminous Coal Commission, a federal administrative agency, ruled that the Sunshine Anthracite Coal Company (Sunshine) was subject to the price-fixing scheme and taxation measures of the Bituminous Coal Conservation Act.<sup>59</sup> Sunshine's appeal of the Commission's exemption denial was challenged on res judicata grounds,<sup>60</sup> a challenge that the Supreme Court tentatively upheld after determining that the Commission acted within its authority.<sup>61</sup>

It was years later, in the seminal case of *United States v. Utah Construction & Mining Co.*,<sup>62</sup> before the Court fully accepted the application of preclusion principles to administrative decisions.<sup>63</sup> *Utah Construction* involved a breach of contract claim between Utah Construction & Mining Company and the Atomic Energy Commission,<sup>64</sup> and the subsequent challenge of the Advisory Board of Contract Appeals administrative ruling.<sup>65</sup> In applying administrative claim preclusion to the Board's findings, the *Utah Construction* Court articulated three requirements to which future courts look to when determining whether to apply claim preclusion to administrative determinations.<sup>66</sup> The *Utah Construction* Court stated in part: "When an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before

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58. *Id.* at 390 (summarizing the appellant's claims that it should be exempt from the Act's regulation and taxation).

59. *Id.* at 390-91 (relating the Commission's findings of fact and conclusions of law).

60. *Id.* at 391 (providing the case's procedural history).

61. *Id.* at 403 (upholding the lower court's refusal of jurisdiction on res judicata grounds based on the Commission's delegated power to rule in such instances). See also *id.* at 400 (explaining that "[t]he functions of the courts cease when . . . the findings of the Commission meet the statutory test" outlined in *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939)). The *Rochester Telephone* test of a "rational basis for the conclusions approved by the administrative body" would later prove insufficient for administrative res judicata purposes, prompting the courts to employ the more streamlined *Utah Construction* three-part test. *Id.* (finding that the court "travel[ed] beyond its province" in reviewing the agency determination). See also *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (narrowing the test for administrative preclusion to only three elements, rather than the broader inquiry of whether preclusion would be "harmonious with the general principles of collateral estoppel").

62. 384 U.S. 394 (1966).

63. *Id.* at 422 (finding that when an agency is acting in a judicial capacity, resolving issues properly before it, and giving the parties adequate opportunity to litigate, administrative claim preclusion applies).

64. *Id.* at 400.

65. *Id.* at 400-01.

66. *Id.* at 422 (noting that when: (1) an agency acts in a judicial capacity; (2) to resolve issues properly before it; and (3) the parties have a full opportunity to litigate, the courts shall apply administrative res judicata).

it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."<sup>67</sup> Although some legal commentators argue that this statement was mere dicta as opposed to a definitive set of criteria,<sup>68</sup> lower federal and state courts routinely utilize this language when applying claim preclusion to agency decisions.<sup>69</sup>

#### D. Differences Between Administrative and Court Proceedings

##### 1. Procedural Deficiencies

There are many differences between administrative adjudications and judicial proceedings that counsel against allowing preclusion of administrative decisions in subsequent federal civil rights claims.<sup>70</sup> One such difference is that many state agencies do not

67. *Id.* at 421-22.

68. See *infra* Part IV. See also Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983) (suggesting that the administrative preclusion language in *University of Tennessee v. Elliott* should not be deemed dispositive). But see Morris, *supra* note 23, at 250 (criticizing the rubric in *University of Tennessee v. Elliott* for failing to include an additional question of the administrative agency's adequacy as a substitute for a federal trial when deciding whether to apply administrative preclusion to that agency's decision).

69. See *infra* Part IV.

70. Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 186 (1984) (comparing the institutional purposes of courts and agencies). "Characteristically, courts adjudicate the rights and obligations of disputants on the basis of principled justifications and distinctions derived from previously adopted legal norms" while regulatory agencies are engines of "continuous social policy formation and implementation." *Id.* (contrasting the dominant objectives and methods of courts versus administrative agencies). Schuck also observes:

Although obliged to render neutral, principled decisions with respect to individual disputes brought before it, an agency's principal purpose is to effectuate an externally created but bureaucratically internalized legislative purpose, usually the protection of certain collective values or group interests . . . . This orientation encourages agencies systematically to undervalue particularized justice in favor of the social interests and policy goals that they are required to pursue through their regulatory programs. These interests and goals usually transcend those of the particular parties before them.

*Id.* at 187 (noting the seemingly inescapable bias in agency decision making). But cf. *id.* at 188 (remarking on the irony that agencies, though granted extensive discretion, tend to make inflexible rules, while courts, which typically eschew discretion, hand down "tractable, malleable rules"). The diverse nature of administrative tribunals makes reliable application of general concepts difficult as well. E.g., *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 283 (1980) (denying application of *res judicata* to Virginia Workers' Compensation Commission award in light of the Commission's limited jurisdiction); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973) (refusing to find EEOC ruling of no reasonable cause to believe discrimination occurred binding on federal court because of the nonadversarial character of EEOC proceedings);

furnish written or published opinions of their hearings.<sup>71</sup> Furthermore, both state and federal court proceedings allow parties to present and challenge all relevant evidence and information to an impartial decision maker, while in administrative hearings, there is no guarantee that the opposing side will be given the opportunity to contest either the evidence or the arguments.<sup>72</sup>

## 2. Inherent Bias

The Supreme Court also expressed concern over the rather summary administrative decision-making process, in particular, the fact that administrative agencies often rendered decisions aimed principally at effectuating the agency's objectives.<sup>73</sup> This difference be-

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Deretich v. Office of Admin. Hearings, 798 F.2d 1147, 1153 (8th Cir. 1986) (precluding § 1983 claim even after determining that plaintiff had met the *Utah Construction* test); Athan v. Prof'l Air Traffic Controllers Org., 672 F.2d 706, 711 (8th Cir. 1982) (reversing trial court decision that allowed collateral estoppel as to an element of tort not actually decided by administrative agency).

71. FRANK E. COOPER, STATE ADMINISTRATIVE LAW, 532 (1965) (describing the informal adjudication process of some state administrative agencies). Even those jurisdictions that provide published opinions often phrase the decision in purely statutory language, without crucial details such as the findings of fact or rationale behind the decision. *Id.* (providing examples of potential problems created by agency informality). Such ephemeral rulings tend to encourage rather than discourage deviations from previous decisions, compounding the already difficult task of predicting hearing outcomes. Hart, *supra* note 5, at 617 (demonstrating the attorney's inability to effectively counsel clients in the absence of reliable administrative precedent). The lack of some states' published (or otherwise illustrative) decisions impacts claim strategy, especially in the rare instance where an administrative hearing is not a prerequisite to a court claim. *Id.* (implying that without a "solid basis" for advising one's client, it is impossible to make an informed choice between an administrative and a judicial claim); JOWELL, *supra* note 34, at 29 (criticizing administrative adjudicatory protocol because of many decisions' unavailability to the public, in addition to the process making it difficult for even attorneys to discern the rationale behind certain decisions). *But see*, Friendly, *supra* note 44, at 1291 (bemoaning the American "ad-dict[ion] to transcripts"); BERNARD K. SCHWARTZ ET AL., LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 132 (1972) (labeling the United States' requirement that almost every proceeding result in some manner of formal record as "unfavourably" impressing foreigners). In England, for example, judicial review is conducted based on the recollection and notes of the hearing officer, rather than a formal transcript. Friendly, *supra* note 44, at 1291-92 (acknowledging that America's lack of confidence in its administrative law judges prevents a simpler approach to transcription).

72. Friendly, *supra* note 44, at 1277 (contrasting the formality between administrative and judicial adjudications).

73. Randy J. Hart, Note, *Administrative Res Judicata in Ohio: A Suggestion For the Future*, 37 CLEV. ST. L. REV. 595, 605 (1989) (acknowledging Supreme Court's fear of institutional bias regarding administrative proceedings). *See also* Kremer v. Chem. Constr. Co., 456 U.S. 461, 498 (1982) (Blackmun, J., dissenting) (relating Congress's fear that state administrative agency procedures would ultimately prove inadequate and less effective than those enforcement methods used by federal judiciary).

tween the administrative and adversarial systems underscores the most compelling reason for not applying administrative claim preclusion: the lack of political independence.<sup>74</sup> A neutral judge or jury provides the optimal potential to uncover the truth and to assess fair and adequate remedies to the appropriate parties.<sup>75</sup> Judges are (theoretically) free from political pressures, especially federal judges who are lifetime appointees.<sup>76</sup> This is, however, not the case with administrative law judges, whose very employment depends upon achieving the agency's goals and objectives. In many cases, administrative plaintiffs are not represented by counsel, increasing the likelihood that the inherent institutional bias will make its way into the administrative law judge's decision.<sup>77</sup>

### 3. Interstate Disparity

In addition to the differences between courts and administrative tribunals, administrative adjudications differ widely from one juris-

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74. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 345-56 (1991) (exposing as the fundamental difference between agencies and Article III courts the ties all agency adjudications have to the agency's enforcement and rulemaking role).

75. Friendly, *supra* note 44, at 1279 (requiring an "unbiased tribunal" in all adjudicatory proceedings). "[T]he further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards . . . ." *Id.* at 1279 (articulating the necessary elements of a fair hearing).

76. *Id.* (observing that "while all judges must be unbiased, some may be, or appear to be, more unbiased than others"). Friendly suggests that less stringent procedural safeguards would be required if the administrative law judge were "not a member of the agency." *Id.* This view is reflected in the increase of centralized administrative hearings offices. *Cf.* Bruff, *supra* note 74, at 345 (arguing that "even formally separate institutions can come to share values, if the informal links between them are strong enough"). Specialized adjudication agencies, like the centralized Texas State Office of Administrative Hearings, become vulnerable, according to Bruff, "due to the effects of a steady diet of subject matter and repeated advocacy from a single source." *Id.* (remarking that administrative law judges are often "in, but not of, the agenc[y]," with the agency retaining a "legitimate interest" in the administrative law judge's determinations).

77. Silver, *supra* note 4, at 376 (claiming that many civil rights litigants cannot afford counsel for the administrative proceedings). *But see* Friendly, *supra* note 44, at 1288 (arguing against the participation of counsel in administrative proceedings). Despite the obvious advantages counsel may offer to parties, there is the high probability that counsel may advance his client's interest using the tools of delay and confusion. *Id.* (considering the impact of counsel's most zealous advocacy on the proceedings themselves). In addition, if counsel appears for the claimant, the government will likely follow suit, providing counsel at the expense of the public treasury and likely complicating and protracting the proceeding. *Id.* (stressing that potentially "amicable" proceedings can become decidedly adversarial with the introduction of counsel into the administrative equation).

diction to the next in terms of procedure and formality.<sup>78</sup> Some states, for example, defer discrimination complaints to their own agencies, while other states allow immediate federal EEOC involvement.<sup>79</sup> Circuit Judge Cudahy warned of the risk of inequity posed by federal application of administrative claim preclusion in *Duggan v. Board of Education*.<sup>80</sup> Judge Cudahy recognized the disparity between the two systems, comparing plaintiffs in non-deferral states, who enjoy a de novo review at the federal level, to plaintiffs in deferral states, who forfeit a federal trial de novo if the responsible state agency rendered its findings of fact within sixty days.<sup>81</sup>

#### IV. THE SUPREME COURT'S APPLICATION OF ADMINISTRATIVE PRECLUSION: *UNIVERSITY OF TENNESSEE V. ELLIOTT*

The *Utah Construction* paradigm<sup>82</sup> remained the test until the Supreme Court expanded the scope of administrative preclusion in *University of Tennessee v. Elliott*,<sup>83</sup> which involved an agency determination regarding a racially motivated discharge.<sup>84</sup> *Elliott* concerned a black employee's allegation of discrimination by the University of Tennessee in violation of several civil rights statutes, including Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983.<sup>85</sup> The University of Tennessee held a hearing, where an assistant to the Vice President of Elliott's department presided as

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78. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105 (1987) (noting that "the infrequency of Supreme Court review combines with the formal independence of each circuit's law from that of other circuits to permit a gradual balkanization of federal law"). Regardless of jurisdiction, however, most administrative activities are rather informal and involve neither the Administrative Procedure Act's rulemaking or adjudication provisions. ROBERT L. RABIN, *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS* 265 (1975) (declaring that "[m]uch regulatory activity takes place through inspections, investigations, negotiations and other low visibility contacts between regulators and regulated parties . . .").

79. *Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1295 (7th Cir. 1987) (noting the differences between states that are able to defer claims to their own agencies and those that must defer to the EEOC).

80. *Id.* at 1295 n.10 (counseling against administrative claim preclusion for unreviewed agency decisions in light of the disadvantage to residents of deferral states).

81. *Id.* at 1295 (comparing deferral and non-deferral states under the ADEA's deferral mechanism).

82. See *supra* Part III.C.1.

83. 478 U.S. 788 (1986).

84. *Id.* at 790 (addressing the preclusive effect of an agency's determination that the petitioner's discharge was not racially motivated).

85. *Id.*

the Administrative Law Judge (ALJ).<sup>86</sup> After unsuccessfully appealing the ALJ's ruling to the department's Vice President, Elliott refused to seek review of the decision in state court, and turned instead to federal court to pursue his civil rights claims.<sup>87</sup> The District Court ruled that the civil rights statutes "were not intended to afford the plaintiff a means of relitigating what [the] plaintiff has heretofore litigated over a five-month period."<sup>88</sup> However, the decision was overturned on both the Title VII and the § 1983 claim by the United States Court of Appeals for the Sixth Circuit,<sup>89</sup> which held that a denial of a trial de novo undermines the intent behind both Title VII and § 1983. The Court further declared that "[a]t least implicit in the legislative history . . . is the recognition that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to a federal court."<sup>90</sup> The Sixth Circuit reversed the lower court, unanimously holding that res judicata did not operate to deny Elliott a trial de novo on his Title VII claim.<sup>91</sup>

The Supreme Court disagreed, however, and while affirming the Sixth Circuit's treatment of Elliott's Title VII claim,<sup>92</sup> the Court opted to exercise its federal common-law powers to give agency fact finding the same res judicata effects in federal court as it would

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86. *Id.* at 791.

87. *Id.* at 791-92. In addition to the conflict of interest concerns arising from the *Elliott* facts, it should be noted that the ALJ expressly refused to consider the civil rights claims (which were later pursued in federal court) and instead heard the related, but legally distinct, question of a racially motivated discharge. *Elliott*, 478 U.S. at 791 (referring to the ALJ's admitted lack of jurisdiction over Elliott's federal civil rights claims). Such a distinction could have arguably prevented (or at least significantly complicated) application of administrative preclusion principles, because the ALJ's admission explicitly negated the possibility of meeting the second prong of the *Utah Construction* test. *See also Utah Constr.*, 384 U.S. at 422 (requiring issues to be "properly before" the administrative body). Arguably, the *Elliott* Court disregarded this detail for purposes of its decision, a decision that relied heavily upon *Utah Construction*. *Elliott*, 478 U.S. at 797-99 (invoking the logic and wisdom of the *Utah Construction* Court).

88. *Elliott*, 478 U.S. at 792 (quoting the District Court's reliance on common-law preclusion principles to deny Elliott's claim).

89. *Id.* at 793-94 (reporting the circuit court's grant of a trial de novo on both claims).

90. *Elliott v. Univ. of Tenn.*, 766 F.2d 982, 992 (6th Cir. 1985) (refusing to fashion a federal common-law rule of preclusion).

91. *Id.*

92. *Elliott*, 478 U.S. at 789, 799 (dissenting only as to the application of res judicata to § 1983 actions, Justice Stevens, Justice Brennan, and Justice Blackmun each concurred regarding Title VII's non-preclusive effects).

receive in that state's courts.<sup>93</sup> Such a rule, the Court claimed, would serve as a "nationally unifying force."<sup>94</sup> While significantly expanding administrative preclusion, the *Elliott* Court did not go as far as to establish an absolute rule to govern administrative preclusion.<sup>95</sup> The Court chose instead to remand the issue back to lower state and federal courts for further refinement.<sup>96</sup>

### A. Refinement in the Lower Courts

The refinement perpetrated by the lower courts resulted in the inevitable split among the circuits.<sup>97</sup> This means that despite the issue preclusion guidelines articulated by the *Elliott* Court, the lower circuit courts have refused to uniformly adopt the claim preclusion tenets regarding unreviewed state administrative decisions on federal claims arising from the same transaction.<sup>98</sup> *Duggan v. Board of Education*<sup>99</sup> and *Stillians v. Iowa*<sup>100</sup> exemplify the split and are helpful in understanding the positions for each side.

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93. *Id.* at 799 (justifying the Court's decision based on an absence of Congressional intent to the contrary). *Cf. Elliott*, 487 U.S. at 800 (Stevens, J., dissenting in part) (criticizing the majority for neglecting to address or even consider the motivation for the early civil rights legislation that created § 1983 causes of action).

94. *Elliott*, 487 U.S. at 799 (quoting *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 289 (1980)).

95. *Id.* (leaving open the question of the claim preclusive effects of unreviewed administrative decisions).

96. *Id.* at 796-797, 799 (upholding the circuit court's grant of a federal trial de novo to Title VII claims, but using policy reasons to supplant § 1983 Congressional intent).

97. *Compare Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1297 (7th Cir. 1987) (concluding that the unreviewed factual agency determinations are not entitled to preclusive effect in subsequent federal suits under the ADEA); *with Stillians v. Iowa*, 843 F.2d 276, 282 (8th Cir. 1988) (finding preclusion principles consistent with the statutory framework and legislative purpose of the ADEA).

98. *DeSario v. Thomas*, 139 F.3d 80, 87 (2d Cir. 1998) (declining to impose an exhaustion requirement on § 1983 claims that would force claimants to bring all claims before state administrative official or risk claim preclusion). *See also G.V.V. Rao v. County of Fairfax*, 108 F.3d 42, 45-46 (4th Cir. 1997) (refusing to give preclusive effect to unreviewed administrative Title VII decision); *Delgado v. Lockheed-Ga. Co.*, 815 F.2d 641, 646-47 (11th Cir. 1987) (holding that because the state administrative agency was not the proper forum to hear ADEA claims, claimant's failure to litigate ADEA claim did not act to bar future federal causes of action). *But see Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th Cir. 1994) (applying federal common-law claim preclusion to § 1983 decisions).

99. 818 F.2d 1291 (7th Cir. 1987).

100. 843 F.2d 276 (8th Cir. 1988).

## 1. *Duggan v. Board of Education*

*Duggan* involved a teacher's claim of age discrimination that was dismissed by the hearing officer assigned to the case,<sup>101</sup> and the subsequent ADEA claim filed in federal court.<sup>102</sup> The Seventh Circuit in *Duggan* applied the *Elliott* Court's Title VII rubric to its own examination of an ADEA claim,<sup>103</sup> and found that the statutes should be construed alike.<sup>104</sup> Acknowledging the lack of explicit Congressional intent regarding preclusion in both Title VII and the ADEA, the *Duggan* court relied on the *Elliott* Court's inferential analysis of Title VII and drew parallels between Title VII and the ADEA.<sup>105</sup> A thorough comparison of the two statutes' deferral mechanisms, as well as the statutes' almost identical substantive prohibitions, suggested similar treatment of Title VII and the ADEA for preclusion purposes, prompting the *Duggan* court to adopt the *Elliott* administrative res judicata prohibition of ADEA claims.<sup>106</sup>

## 2. *Stillians v. Iowa*

In contrast, the Eighth Circuit examined an almost identical situation in *Stillians v. Iowa*,<sup>107</sup> and came to the opposite result reached in *Elliott* and *Duggan*.<sup>108</sup> The district court in *Stillians* found that the legislative intent behind the ADEA regarding preclusion more

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101. *Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1292 (7th Cir. 1987). It is interesting to note that among *Duggan*'s complaints was the allegation that he was unable to provide the necessary documentary evidence in support of his discrimination claim because of the inadequate discovery measures allowed in the administrative proceeding. *Id.* Under Illinois law, there was no method available for *Duggan* to compel production of documentary evidence. ILL. ADMIN. CODE. tit. 122, § 24-12 (1985) (outlining the extent to which an Illinois hearing officer may issue subpoenas and other devices).

102. *Duggan*, 818 F.2d at 1292.

103. *Id.* at 1294 (examining *Elliott* and discussing the circuit split).

104. *Id.* at 1295 (examining the ADEA deferral mechanism as compared to Title VII's deferral statute).

105. *Id.* at 1294-95 (following the Supreme Court's inferential approach in its own examination of the ADEA).

106. *Duggan*, 818 F.2d at 1295 (drawing on the Supreme Court's treatment of Title VII claims after comparison with the ADEA). *Cf. Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (finding that while Title VII and the ADEA share the same aims and prohibitions, the statutes do not mirror each other regarding claimant's right to a jury trial).

107. 843 F.2d 276 (8th Cir. 1988).

108. *Id.* at 276.



closely resembled § 1983 than Title VII.<sup>109</sup> The Eighth Circuit focused on the language of the ADEA to inform its decision to preclude the federal discrimination claim.<sup>110</sup> Specifically, the *Stillians* court declined to extend the *Elliott* treatment of Title VII to the ADEA based solely on the similarity between select sections of the statutes.<sup>111</sup> Expressly rejecting the *Duggan* approach of comparing the statutes, the *Stillians* court refused to “reason by analogy when interpreting statutes.”<sup>112</sup> Instead, the court examined the ADEA in isolation to determine the underlying Congressional intent.<sup>113</sup> The *Stillians* court noted the absence of any language inconsistent with preclusion, and found res judicata principles applicable.<sup>114</sup>

## V. THE NECESSITY OF JUDICIAL REVIEW OF AGENCY FINDINGS

One of the court’s most important functions is to ensure that administrative actions remain within their statutorily proscribed

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109. *Id.* at 279-80 (relating the procedural history of the dispute before the court).

110. *Id.* at 280 (discussing the Supreme Court’s decision in *Elliott*, and concluding that the “most important lesson” to be learned was that in the absence of explicit Congressional guidance, courts are charged with discerning the implicit legislative intent).

111. *Id.* at 281-82. Remarkably, after the *Stillians* court criticized the *Duggan* court for its interpretation of ADEA by language analogous to Title VII rather than according to Congressional intent, the Eighth Circuit itself relied on statutory language differences between the ADEA and Title VII to distinguish its holding from *Elliott*. *Id.* (finding that a comparison of the statutes’ language revealed dissimilarities). Chief Justice Lay, in his *Stillians* dissent, points out the majority’s inconsistent logic, and notes the *Elliott* Court’s comparison of Title VII and § 1983 was founded on the same rationale. *Id.* at 283 n.1 (Lay, C.J., dissenting) (criticizing both the *Elliott* and *Stillians* decisions for utilizing “an improper method of determining congressional intent”).

112. *Id.* at 281 (declining parallel treatment of ADEA and Title VII based upon the parallels between the statutes).

113. *Stillians*, 843 F.2d at 281 (adopting the “proper analysis” for finding application of preclusion principles).

114. *Id.* at 281-82 (finding “highly probative” the ADEA’s lack of any language inconsistent with administrative preclusion). *But see id.* at 281-82 (acknowledging the court’s disapproval of inferring Congressional intent based on the absence of a negative). Twice the *Stillians* court referenced its objection and aversion to the method of analysis it ultimately chose, yet remarkably the court was left with the “firm conviction” that Congress did not intend preclusion principles to apply to the ADEA. *Id.* at 282 (weakening the court’s own holding by relying on suspect logic). The court’s finding of preclusion applicability is hardly strengthened by statements such as “[w]hether this was by conscious design or by default is really not important” when referencing Congressional intent. *Id.* at 282 (providing a less than compelling rationale for its determination of Congressional intent).

boundaries.<sup>115</sup> The legitimacy of administrative decisions depends in part on the agency's ability to receive judicial validation of its rulings.<sup>116</sup> In this regard, Justice Blackmun once stated that "[s]tate court review [of administrative decisions] is merely the last step in the administrative process, the final means of review of the state agency's decision."<sup>117</sup> Concerns over "cabining political discretion" are at the heart of judicial reviewing agency determina-

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115. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986) (discussing the judiciary function of ensuring that administrative agencies stay within intended boundaries).

116. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38 (1975) (observing that judicial review provides the first hard look at an administrative agency's analysis and conclusions); COOPER, *supra* note 5, at 305 (recognizing the four central functions of the courts in reviewing administrative decisions: "1) checking excessive assumptions of power . . . ; 2) speaking the final word on important questions of statutory interpretation; 3) requiring fair procedure in administrative action; and 4) invalidating arbitrary or capricious administrative action"); EDLEY, *supra* note 3, at 236 (observing that judicial review serves the important function of reassuring an authoritative decision). The Restatement (Second) of Judgments details the requirements necessary before a court may apply administrative res judicata. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1981) (providing both persuasive authority and helpful commentary regarding preclusion). The general rule under the Restatement is that "a valid and final adjudicative determination by an administrative tribunal" enjoys the same preclusive effect as a court judgment would in subsequent litigation. *Id.* at § 83(1) (outlining the general rule and its effects). There are three primary qualifications to the general rule, however. First, the administrative proceeding must contain the "essential elements of adjudication." *Id.* at § 83(2) (noting the first requirement for preclusion). These essential elements include: (1) adequate notice to any parties expected to be bound by the litigation, (2) the opportunity to both present supporting evidence and rebut opposing evidence, (3) a formulation of the specific issues of law and fact to be addressed by the administrative tribunal, (4) a rule of finality, and (5) any additional procedural elements necessary "to constitute the proceeding a sufficient means of conclusively determining the matter in question . . ." *Id.* (cataloging considerations for preclusion). Second, relitigation of a claim is not barred under claim preclusion if the "scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim." *Id.* at § 83(3) (describing the problem as one of statutory interpretation). Third, though by no means exhaustive, issue preclusion does not act as a bar to relitigation provided that the disputed issue is allowed independent resolution by a subsequent tribunal. *Id.* at § 83(4) (explaining that if a trial de novo is held as to a certain issue, there can be no preclusion).

117. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 490 (1982) (Blackmun, J., dissenting) (articulating rationale for requiring judicial review of state administrative agency adjudications). In his dissent, Justice Blackmun also addressed the importance of the term "proceeding" when deciding the role of judicial review of administrative adjudications. *Id.* at 494, n.10 (explaining that Congressional inclusion of judicial review of an agency decision could rationally be found to exist under the heading "proceeding" without also having to include an entire state court trial on the merits within the boundaries of a "proceeding").

tions,<sup>118</sup> with “direct discovery of an agency’s motives” another primary focus.<sup>119</sup> The judicial superintending of administrative decisions gave way to four primary categories of concern: “1) checking excessive assumptions of power . . . ; 2) speaking the final word on important questions of statutory interpretation; 3) requiring fair procedure in administrative action; and 4) invalidating arbitrary or capricious administrative action.”<sup>120</sup>

Civil rights and other distinctly federal objectives are adjudicated by administrative agencies as long as a provision is made for judicial review.<sup>121</sup> This rule received affirmation in *Kremer v. Chemical Construction Corporation*.<sup>122</sup> *Kremer* is a 1982 United States Supreme Court decision holding that federal district courts are required to give preclusive effect to a state court affirmance of a state administrative agency’s rejection of a Title VII discrimination claim.<sup>123</sup> In *Kremer*, the plaintiff, a Polish immigrant, was laid off by Chemical Construction Corporation (Chemico) along with several other Chemico employees.<sup>124</sup> Later many of these employees were rehired, but Chemico refused Kremer’s repeated requests to be rehired.<sup>125</sup> Kremer thereafter filed a discrimination claim with the EEOC alleging failure to rehire based on his Jewish faith and national origin.<sup>126</sup> After hearing his claim, the New York State Division of Human Rights (NYHRD) concluded that there was no

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118. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) (describing the reviewing courts’ motivations when examining agency rulings). “Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy.” *Id.* (establishing a rationale for judicial review); see also EDLEY, *supra* note 3, at 193 (summarizing case law motivations behind “hard-look” judicial review).

119. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 554 (1985) (identifying agency fidelity to statutory purpose as a necessary strategy for reviewing courts).

120. *Id.* at 553-55 (reviewing main objectives of judicial review).

121. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 115 (1982) (White, J., dissenting) (emphasizing the importance of judicial safeguards to otherwise unchecked administrative adjudicatory powers); BERNARD K. SCHWARTZ, *ADMINISTRATIVE LAW* 11 (3d ed. 1991) (describing judicial review as “the ultimate constitutional safeguard”).

122. 456 U.S. 461 (1982).

123. *Id.* at 485 (relying on the absence of an “‘affirmative showing’ of a ‘clear and manifest’ legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment”).

124. *Id.* at 463 (prefacing the Court’s opinion with the facts of the case).

125. *Id.*

126. *Id.* (describing the events leading up to the Title VII litigation).

evidence to support a charge of discrimination.<sup>127</sup> Consequently, *Kremer* sought judicial review with the Appellate Division of the New York Supreme Court, which unanimously affirmed the NYHRD ruling.<sup>128</sup>

The *Kremer* Court observed that nowhere in Title VII is the claimant required to pursue an unfavorable state administrative decision in state court,<sup>129</sup> but once a plaintiff does seek the finality found in judicial review, claim preclusion is absolutely appropriate under federal common-law preclusion doctrine.<sup>130</sup> It is important to note that *Kremer* involved an administrative determination that was subjected to judicial review, therefore enjoying enhanced due process protection, making application of claim preclusion more appropriate.<sup>131</sup>

Christopher Edley, a professor at Harvard Law School, addressed the legitimacy that multiple forums can provide agency determinations.<sup>132</sup> The necessity of constitutional checks and balances on the inherently executive administrative process requires a multiplicity of forums to ensure that one branch does not become overburdened and consequently incapable of properly and effectively governing.<sup>133</sup> Edley points to the legislative response of delegating responsibility to administrative agencies to aid in the otherwise legislative task of policy-making as an example of this need for multiple forums.<sup>134</sup>

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127. *Id.* at 464.

128. *Kremer*, 456 U.S. at 464 (relating the procedural history of *Kremer*).

129. *Id.* at 469 (discussing the permissiveness of judicial review for unfavorable state administrative agency decisions under Title VII).

130. *Id.* at 470-71 (relying on both the language of Title VII and prior court decisions to refuse redetermination of a final judgment).

131. *Id.* at 484 (concluding that the state's extensive procedural requirements, ending in judicial review, provide sufficient due process protection).

132. EDLEY, *supra* note 3, at 236-37 (lauding the incorporation of separation of powers doctrine into the system of judicial review of administrative determinations). *See also* Bruff, *supra* note 8, at 332 (reporting that institutional separation effects the quality of the agency decision).

133. EDLEY, *supra* note 3, at 236 (opining that the explosion of demands upon each branch of government requires stricter adherence to separation of powers principles); *see also* Bruff, *supra* note 8, at 346-47 (echoing the need for an independent adjudicator).

134. EDLEY, *supra* note 3, at 236-37 (buttressing his multiple forum argument with examples of inter-branch delegation). *See also* Bruff, *supra* note 8, at 346-47 (relying on institutional independence as a tool to ensure an unbiased decision).

## VI. HISTORY AND PURPOSE OF CIVIL RIGHTS

Rights created and designed primarily to protect individuals from attacks on their freedom by other persons are called civil rights.<sup>135</sup> The first civil rights legislation was proposed by President John F. Kennedy, and called for enforcement through federal court suits.<sup>136</sup> Though lacking crucial bipartisan support, and countered by Senate Bill 1937, introduced by Senator Hubert Humphrey (D-Minn.),<sup>137</sup> Kennedy's vision eventually culminated into the establishment of the EEOC.<sup>138</sup> As conceived by the drafters of the Civil Rights Act of 1964, all civil rights enforcement power was reserved to the federal courts with express refusal of such jurisdiction to the administrative agency, the EEOC.<sup>139</sup>

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135. EDWIN S. NEWMAN, *THE LAW OF CIVIL RIGHTS AND CIVIL LIBERTIES* 73 (1949), reprinted in EDWIN S. NEWMAN, *THE FREEDOM READER* 167 (1963) (defining civil rights as united by common purpose and goals).

136. H.R. 405, 88th Cong. (1964). See also BNA OPERATIONS MANUAL ON FAIR EMPLOYMENT PRACTICES, PUBLIC ACCOMMODATIONS AND FEDERAL ASSISTANCE, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, AND LEGISLATIVE HISTORY* 20 (1964) [hereinafter BNA OPERATIONS MANUAL] (calling for civil rights enforcement using the federal judiciary).

137. BNA OPERATIONS MANUAL, *supra* note 136, at 21 (describing opposition to the Civil Rights Act of 1964).

138. Karen L. Ross, Note, *Combating Racism: Would Repealing Title VII Bring Equality To All?*, 21 SETON HALL LEGIS. J. 141, 151-52 (1997) (outlining the historical evolution of civil rights legislation in the United States).

139. BNA OPERATIONS MANUAL, *supra* note 136, at 21 (awarding enforcement power not to the EEOC, but instead to federal district courts). See also *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 469 (1982) (remarking that "the federal courts were entrusted with ultimate enforcement responsibility [of Title VII]"); *Kremer*, 456 U.S. at 494-95 (Blackmun, J., dissenting) (recognizing the repeated refusals by Congress to award state agencies exclusive jurisdiction over allegations of discrimination); Mark T. Conlon, Comment, *Employment Law - Arbitration Not A Prerequisite To Federal Court Proceeding On A Title VII Claim*, 24 SUFFOLK U. L. REV. 271, 277 (1990) (emphasizing that Congress intended the judiciary to "exercise final responsibility for the enforcement of Title VII"); Clifford R. Perry, III, Note, *State Administrative Preclusion in ADEA Federal Court Suits—Answering Elliot's Call*, 67 WASH. U. L.Q. 1131, 1134 (1989) (stating that "Congress vested federal courts with the final responsibility for enforcement of Title VII claims"); 110 CONG. REC. S13693-95 (daily ed. June 13, 1964) (detailing the debates surrounding the enforcement of Title VII). But see 105 CONG. REC. S6449 (daily ed. April 22, 1964) (reporting comments of Senator Dirksen, one of the primary drafters of the Senate version of the Civil Rights Act). Senator Dirksen remarked:

What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other. Should we draw and quarter the victim?

*Id.* (arguing against multiple forum enforcement for civil rights).

### A. *Protection of Civil Rights Through Federal Courts*

As originally conceived by the 1964 Congress responsible for passing the original Civil Rights Act, federal courts were considered obligated to ensure that civil rights were fully protected.<sup>140</sup> The United States Supreme Court recognized the limited jurisdiction state agencies have over grievances based on civil rights violations.<sup>141</sup> The full extent of the federal judiciary's responsibility can be seen in Senator Hubert Humphrey's remarks to the United States Senate:

[W]e recognized the absolute necessity of providing the Federal Government with authority to act in instances where States and localities did not choose to exercise these opportunities to solve the problem of civil rights in a voluntary and localized manner. The basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected.<sup>142</sup>

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140. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761-62 n.8. (1979) (quoting 110 CONG. REC. S12725 (daily ed. June 15, 1964)). See also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 115 (1982) (White, J., dissenting) (urging judicial review of administrative adjudications); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 498 (Blackmun, J., dissenting) (relating that throughout Title VII's legislative evolution, Congress feared that state administrative agency procedures would ultimately prove inadequate and less effective than those enforcement methods the Congress envisioned being used by federal actors). The entire process of retroactive legislative intent interpretation is suspect at best, however, proving a fertile area for scholarly debate. Compare *Kremer*, 456 U.S. at 472, n.9 (lamenting the scarcity of available legislative records to aid in Congressional interpretation efforts), with *Kremer*, 456 U.S. at 498, n.12 (Blackmun, J., dissenting) (lauding the Clark-Case memorandum as being especially instructive in determining Title VII legislative intent).

141. *Oscar Mayer*, 441 U.S. at 761 (interpreting portions of the ADEA to only slightly extend state agency opportunity at settling grievances in a "voluntary and localized manner"); cf. Silver, *supra* note 4, at 375 (listing agencies that, while not able to hear civil rights claims are allowed to make determinations related to and having impact on civil rights claims).

142. 110 CONG. REC. S12725 (daily ed. June 15, 1964) (quoting Senator Humphrey during legislative debate over the Civil Rights Act of 1964). Additionally, the Supreme Court noted in *Alexander v. Gardner-Denver Co.* that "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (defining the motivation behind judicial review of agency civil rights determinations).

It is important to note, however, that the absence or unavailability of state remedies does not foreclose federal relief.<sup>143</sup>

### *B. Other Aspects Bolstering the Continued Presence of Civil Rights*

The underlying reasons for the passage of civil rights legislation are far more complex than the often morality-tinged racial equality concerns normally proffered as justification.<sup>144</sup> Though traditionally referred to within a moral context,<sup>145</sup> scholars are not convinced that morality alone would have compelled Congress to enact civil rights legislation.<sup>146</sup> Economic pressures factored heavily into the decision,<sup>147</sup> as did Congressional worries regarding the

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143. *Oscar Mayer*, 441 U.S. at 761 (rejecting the notion that Congress intended absence of state relief to also foreclose federal relief of civil rights claims); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 893 (2d Cir. 1971) (finding that § 1983 "enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate").

144. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 25 (1997) (listing community, commerce, morality, order, history, and structure as the motivations behind civil rights legislation); U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 117 (1965) (listing several detrimental national economic effects of employment discrimination) *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 29 (1981).

145. Radio and Television Report to the American People on Civil Rights, 63 PUB. PAPERS 469 (1964) (declaring "[w]e are confronted primarily with a moral issue . . . as old as the scriptures and . . . as clear as the American Constitution"); Deval Patrick, *Reclaiming America's Conscience*, Legal Times, April 23, 1994, at 16 (referring to civil rights as the "great moral imperative").

146. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 27 (1997) (asking whether moral concerns were the only motivation behind civil rights legislation). *Accord* Exec. Order No. 10,974, 3 C.F.R. 412 (1961-1965) (establishing the President's Committee on Civil Rights under President Truman). "The preservation of civil rights guaranteed by the Constitution is essential to domestic tranquility, national security, the general welfare, and the continued existence of our free institutions." *Id.* (proclaiming the importance of protecting civil rights). Four central types of individual rights were recognized by the President's Committee on Civil Rights: 1) the "right to safety and security of the person," 2) the "right to citizenship and its privileges," 3) the "right to freedom of conscience and expression," and 4) the "right to equality of opportunity." TO SECURE THESE RIGHTS, THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 4-9 (1947) (valuing four types of individual liberties over all others) *reprinted in* EDWIN S. NEWMAN, THE FREEDOM READER 169-72 (2d ed. 1963). The government's commitment to "equality of opportunity" is reflected in each of the federal statutes at issue; § 1983, Title VII, and the ADEA.

147. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 27 (1997) (reporting that when civil rights legislation was passed, racial discrimination was believed to exclude up to ten percent of the

continued unrest in the Southern states.<sup>148</sup> Many of these same concerns are reasonably at the heart of enforcing individual civil rights.<sup>149</sup> Given the substantial portion of the population that is either a racial minority or female (coupled with the potential to fall into more than one of these categories), it is arguable that the political and economic motivations may be even stronger today than in 1964, in spite of an arguably weaker moral motivation.<sup>150</sup>

### C. Weakening of Civil Rights

With the passage of time and changes in the country's political make-up, attempts at weakening the importance and the protection of individual civil rights are increasingly frequent.<sup>151</sup> In spite of ar-

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nation's population from jobs and the marketplace); accord BUREAU OF THE CENSUS, 1977 STATISTICAL ABSTRACT OF THE UNITED STATES 25 (1977) (showing that the American population in 1960 was ten percent black).

148. Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*, 247-56 (1994) (describing the country's staunch resistance to desegregation efforts); COMMISSION ON CIVIL RIGHTS, UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, at 65-77 (1961) (acknowledging state legislative attempts at circumventing constitutional and federal desegregation laws aimed at desegregation).

149. It is a useful comparison to note that while conducting the Secretary of Labor Report commissioned by Title VII, the Secretary found that arbitrary age discrimination was detrimental to the nation's economy in that it robbed the nation of productive workers and contributed to increased payment of unemployment and social security benefits. U.S. Dep't of Labor, *The Older American Worker, Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965), reprinted in EEOC, *Legislative History of the Age Discrimination in Employment Act* (1981) (reporting the findings of the Title VII-mandated investigation into age discrimination). The Secretary also found older workers often suffered from serious economic and psychological impairment as a result of age discrimination. *Id.* at 18 (advancing several negative effects of age discrimination on the American public).

150. EDWIN S. NEWMAN, *THE FREEDOM READER* 186 (2d ed. 1963) (asking whether each citizen is "economically, socially, politically—and psychologically—a first-class citizen, fully integrated in American society"). See also, *TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS*, at 133-35 (declaring that "[t]he achievement of full civil rights in law may do as much to end prejudice as the end of prejudice may do to achieve full civil rights . . . The fewer the opportunities there are to use inequality in the law as a reinforcement of prejudice, the sooner prejudice will vanish"), reprinted in EDWIN S. NEWMAN, *THE FREEDOM READER* 208 (2d ed. 1963).

151. The recent Reagan and Bush administrations exhibited an almost openly hostile attitude towards civil rights. Karen L. Ross, Note, *Combating Racism: Would Repealing Title VII Bring Equality To All?*, 21 SETON HALL LEGIS. J. 141, 148-49 (1997) (criticizing both administrations' historical veto's on civil rights legislation, and each's reluctance to appoint minorities to important government positions); BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* 20 (1997) (reporting the Reagan-Bush era's staunch opposition to enforcing affirmative action); JACK GREENBURG, *CRUSADES IN THE COURTS* 380



guable hostility toward and weakening of the federal government's commitment to protecting individual civil rights, Congress recently passed significant legislation aimed at expanding civil rights protections.<sup>152</sup> It is therefore important to recognize that for purposes of statutory construction, legislative observations and opinions made years after enactment of civil rights legislation are in no way a part of the legislative history.<sup>153</sup> The controlling intent is that of the enacting Congress alone.

## VII. ADMINISTRATIVE PRECLUSION AND CIVIL RIGHTS LITIGATION

The Supreme Court has gradually elaborated on its vision of administrative preclusion, but its efforts at clarification have only succeeded in further muddling the problem. *Utah Construction* left circuit courts with three necessary factors for applying claim preclusion to administrative decisions: 1) was the agency acting in a judicial capacity; 2) did the agency resolve issues of fact properly before it; and 3) did the parties have an adequate opportunity to litigate?<sup>154</sup>

Concerns about overstepping separation of powers boundaries by creating federal common law prompted the Supreme Court to re-examine the issue in light of statutory language and Congressional intent much later in the *University of Tennessee v. Elliott* decision.<sup>155</sup> The *Elliott* Court faced the issue of whether a state administrative law judge's decision that Elliott was not discharged because of racially motivated prejudice precluded subsequent fed-

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(1994) (reporting Reagan's and Bush's limited appointment of women and minorities to the bench).

152. 42 U.S.C. §§ 1971-74 (1988) (amending and improving the Voting Rights Act of 1982); 42 U.S.C. §§ 3601, 3616 (1988) (expanding the Fair Housing Act); 20 U.S.C. §§ 706, 794 (1987) (overriding Reagan's presidential veto to pass the Civil Rights Restoration Act of 1987).

153. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (refusing to consider a Senate Report written eleven years after passage of the ADEA); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (recognizing that the intent of the Congress that enacted the statutory section controls judicial interpretation); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) (rejecting inclusion of legislative observations into legislative history).

154. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966) (proffering a list of preclusion requirements).

155. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 795-98 (1986) (using legislative history and previous Supreme Court holdings to determine the preclusive effects of Title VII and § 1983 claims).

eral claims of civil rights violations.<sup>156</sup> Initially, the district court ruled that the civil rights statutes were not designed to allow plaintiffs to relitigate an already decided matter.<sup>157</sup> The Supreme Court, however, overturned the Court of Appeal's reversal by utilizing its rule of preclusion as it pertains to an administrative agency's findings of fact in § 1983 actions.<sup>158</sup> The *Elliott* Court declared that in the absence of any evidence to the contrary, it would fashion a common-law rule of preclusion.<sup>159</sup>

### A. Treating Title VII and ADEA Claims Alike

#### 1. *Astoria Federal Savings and Loan Association v. Solomino*: Treatment of Title VII and ADEA

The United States Supreme Court addressed the issue of administrative preclusion in the context of age discrimination in *Astoria Federal Savings & Loan Association v. Solimino*,<sup>160</sup> a 1991 decision holding that the judicially unreviewed findings of a state administrative agency had no preclusive effect on federal proceedings.<sup>161</sup>

In *Astoria*, Solimino filed a charge with the EEOC claiming a violation of the ADEA.<sup>162</sup> The state agency responsible for handling the claim found no probable cause to support allegations of age discrimination and dismissed the claim.<sup>163</sup> Rather than pursue the claim in state court, Solimino filed an age discrimination claim in federal district court grounded on the same factual basis.<sup>164</sup> Justice Souter, in delivering the opinion of the Court, addressed the Court's preference for application of the common-law doctrine of preclusion to final administrative claims.<sup>165</sup> Invoking the standards

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156. *Id.* at 790.

157. *Id.* at 792.

158. *Id.* at 797-99 (providing both historical and practical reasons for applying claim preclusion principles to § 1983 administrative fact finding).

159. *Id.* at 799 (justifying the Court's decision based on an absence of Congressional intent to the contrary). *Cf. id.* at 799-800 (Stevens, J., dissenting in part) (criticizing the majority for neglecting to address or even consider the motivation for the early civil rights legislation that created § 1983 causes of action).

160. 501 U.S. 104 (1991).

161. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991) (declaring that federal courts face no preclusion from state administrative agency findings regarding age discrimination claims).

162. *Astoria*, 501 U.S. at 106.

163. *Id.*

164. *Id.* at 106-07.

165. *Id.* at 107 (stating that "[w]e have long favored application of the common-law doctrines of collateral estoppel . . . and res judicata . . . to those determinations of administrative bodies that have attained finality").

outlined in *Utah Construction*, Justice Souter emphasized the unfairness that would result were an applicant allowed a “rematch after a defeat fairly suffered.”<sup>166</sup>

Rather than continue to evaluate Solimino’s claim according to preclusion principles, the Court switched gears to instead focus on Congressional intent.<sup>167</sup> Noting that the Court presumes Congress to operate “against a background of common-law adjudicatory principles”<sup>168</sup> such as preclusion, Justice Souter observed that in spite of the rule of preclusionary preference, certain circumstances render preclusion unsuitable.<sup>169</sup> Among the things that can advise against the suitability of preclusion are the “specific context of the rights at stake” and the “relative adequacy of agency procedures.”<sup>170</sup> In addition, it bears noting that Justice Souter made multiple statements distinguishing judicially unreviewed state administrative agency decisions from those that previously faced judicial scrutiny.<sup>171</sup>

## 2. Implications of *Astoria* for the Proposition that Administrative Decisions Touching on Civil Rights Issues Should Be Reviewable

Echoed in *Astoria* was the understanding that the Congressional intent behind the passage of Title VII was to promote equality in the American workplace by prohibiting discriminatory employment practices based upon one’s “race, color, religion, sex, or national origin.”<sup>172</sup> Congress likewise passed the Age Discrimination

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166. *Id.* at 107 (quoting the repose enforcement paradigm laid out in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

167. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (questioning legislative intent before applying administrative preclusion to Solimino’s claim).

168. *Id.* at 108 (articulating legislative interpretation standards and assumptions).

169. *Id.* at 109-10 (listing the considerations that must be addressed before applying claim preclusion).

170. *Id.* at 110 (refusing to blindly apply preclusionary principles).

171. *Id.* at 107, 113 (stressing that the *Astoria* holding pertains to only those administrative adjudications that have not been appealed to a state district court, thereby achieving finality).

172. 42 U.S.C. § 2000e-2 (1994) (outlining provisions of Title VII); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (observing “that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (stating that Congress enacted Title VII to ensure employment opportunity equality); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (declaring Congressional intent behind Title VII was to end employment

in Employment Act (ADEA) of 1967<sup>173</sup> to combat the growing problem of age discrimination in the American workplace.<sup>174</sup> The two acts are traditionally interpreted through references to one another, with the ADEA uniformly considered prompted by and patterned after Title VII.<sup>175</sup>

discrimination on the basis of race, religion, color, national origin, or sex); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (announcing that the equality objective of Title VII is "plain from the language of the statute"); Monica L. Goodman, Comment, *Title VII and the Federal Arbitration Act*, 33 TULSA L.J. 665, 674-75 (1997) (labeling Title VII's legislative intent to eradicate discrimination facially evident). Section 2000e-2 of Title VII provides:

It shall be unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges, of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1994) (prohibiting discriminatory employment practices).

173. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)) (prohibiting age discrimination).

174. 29 U.S.C. § 623(a) (1994) (prohibiting discriminatory employment practices based on age). Section 623 of the ADEA states in part: "It shall be unlawful for an employer . . . to fail to hire or to discharge any individual . . . because of such individual's age . . . ." 29 U.S.C. § 623(a)(1) (1994) (outlawing age-based employment discrimination). As a compromise for those legislators who wanted to include "age" within Title VII's protected classes, the original enactment of Title VII ordered the Secretary of Labor to study the effect of age discrimination in America, the resulting report ultimately becoming the blueprint for the ADEA. Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964) (repealed 1966) (requiring the Secretary of Labor to investigate age-based discrimination); Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact, in AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS* 68, 83 (1982) (concluding that the Secretary's Report was "the basic document shaping the thinking of Congress which led to the Age Discrimination Act"); JOSEPH E. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 2 (2d ed. 1990) (discussing the Secretary's report and concluding that "[t]he Report led directly to the enactment of the ADEA"). See also *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983) (noting in its discussion of the ADEA's legislative history that recommendations contained in the Secretary's report were accepted by both the executive and legislative branches).

175. *Lorillard v. Pons*, 434 U.S. 575, 584 n.12 (1978) (observing that substantial portions of the ADEA "were derived in *haec verba* from Title VII"). "In *haec verba*" means "in the same words." BLACK'S LAW DICTIONARY 782 (6th ed. 1990) (defining "in *haec verba*"). Comparisons between the actual language of the statutes reveals their almost identical drafting. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972) (observing that prohibitions contained in the ADEA are almost identical to those of Title VII). Compare 42 U.S.C. § 2000e-2(a)(1)-(2) [Title VII provision] which states:

It shall be an unlawful employment practice for an employer—

Many commentators argued that the ADEA and Title VII should be treated differently because the ADEA was enacted as an independent statutory scheme rather than as an amendment to the existing Title VII.<sup>176</sup> This argument ignores the political realities of lawmaking entirely, and instead only heaps more legal fiction atop the growing pile of illusory tricks used by the judiciary to aid in statutory interpretation. It hardly stretches the imagination to envision a group of modern lawmakers vehemently rejecting any suggestions toward an efficient amendment approach to ending age discrimination in favor of a bolder, catchier, easier-on-the-voters-ears independent Congressional act. This rationale no doubt rings

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(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2) (1994) (prohibiting employment discrimination), with 29 U.S.C. § 623(a)(1)-(2) [ADEA provision] which states:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(1)-(2) (1994) (prohibiting age-related discrimination). The parallels between the two statutes support the argument against application of claim preclusion to state administrative decisions, but one must resist the urge to treat the ADEA and Title VII identically in all instances. An example of an ill-suited parallel between the two can be seen in the debate over application of disparate impact liability to the ADEA in light of the recent disparate impact amendment to Title VII. Compare Brendan Sweeney, Comment, "Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability, 41 VILL. L. REV. 1527, 1574-75 (1996) (urging that the extension of disparate impact doctrine to the ADEA is logical when the statute's similarities to Title VII are revealed); with Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 310-11 (1995) (arguing against extension of disparate impact theory to ADEA claims due to the constitutional equal protection distinctions made between the classes each statute protects).

176. CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 640 (2d ed. 1983) (noting Congress's refusal to amend Title VII to include ADEA provisions); Clifford R. Perry, III, Note, *State Administrative Preclusion in ADEA Federal Court Suits—Answering Elliott's Call*, 67 WASH. U. L.Q. 1131, 1131 (citing 268 N.L.R.B. 601 (1984) (noting Congress's refusal to amend Title VII to include the ADEA provisions)).

truer for many of those more jaded legal scholars than the feeble circumstantial factors used by the Court.

### 3. Continued Implications and Reasons to Treat Title VII and ADEA Equally

In addition to Congressional intent, a thorough comparison of Title VII's deferral mechanisms with those of the ADEA urges identical construction of the two statutes with respect to administrative claim preclusion.<sup>177</sup> Deferral mechanisms allow state agencies a limited opportunity under state law to address allegations of discrimination.<sup>178</sup> Deferral mechanisms further operate to define the statute's relationship to the federal courts, state agencies, and the EEOC,<sup>179</sup> and are often seen as the primary indicator of Congressional intent regarding the availability of forums for claims arising under a particular statute.<sup>180</sup> For example, the Seventh Circuit in *Duggan*, found that the ADEA's deferral mechanism is derived from that of Title VII.<sup>181</sup> Both statutes allow employment discrimination claims to be heard in multiple forums, suggesting that the adjudicatory process was not meant to end at the less formal administrative stage, without any opportunity for a judicial remedy.<sup>182</sup> Judge Cudahy, of the Seventh Circuit wrote: "Congress obviously intended that persons with discrimination claims first submit them to state and federal agencies in the hope that the complaint could be resolved through administrative means before turning to the courts."<sup>183</sup>

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177. *Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1295 (7th Cir. 1987) (refusing to infer Congressional intention to end discrimination enforcement measures at the administrative level).

178. *Id.* (explaining the purpose of a deferral mechanism).

179. *Id.* (articulating the effects of a deferral mechanism).

180. *Id.* (explaining that "[d]eferral mechanisms effectively define the relationship between state agencies, the EEOC, and the federal judiciary.").

181. *Id.* (comparing the state agency opportunity to resolve discrimination claims between the ADEA and Title VII). See also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (acknowledging the similarities between the ADEA and its predecessor, Title VII, and finding that ADEA was based in large part on Title VII).

182. *Duggan*, 818 F.2d at 1295 (interpreting the multiple forum deferral mechanisms to extend discrimination adjudication beyond the administrative level). Cf. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 478 (1982) (denying a federal trial de novo for Title VII claims already granted a state district court judgment).

183. *Duggan*, 818 F.2d at 1295 (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979)). Judge Cudahy went on to say, "[I]t is unlikely that Congress intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." *Id.*

### B. Providing § 1983 Claims De Novo Review

While the legislation creating § 1983 actions has an earlier genesis from both Title VII and the ADEA, the underlying impetus for the statute is very much in keeping with the rationale behind each of the later statutes.<sup>184</sup> In *Monroe v. Pape*,<sup>185</sup> the United States Supreme Court gave substantial treatment to the historical and legislative events leading up to the enactment of § 1983.<sup>186</sup> The most remarkable similarity between § 1983, Title VII, and the ADEA is that each is a concerted effort to remedy civil rights violations.<sup>187</sup> Another important parallel, especially in terms of the advisability of administrative claim preclusion, is the provision for multiple forums in each statute.<sup>188</sup> The *Monroe* Court also found as a facially apparent motive for enactment of § 1983 the desire to provide a "federal right in federal courts."<sup>189</sup>

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184. Compare *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (concluding that Congress in enacting § 1983 meant to provide a remedy for persons deprived of constitutional rights, privileges and immunities), with 42 U.S.C. § 2000e, et seq. (1994) (declaring the purpose of Title VII, in part, is "to authorize . . . suits to protect constitutional rights"), and 29 U.S.C. § 621 (1994) (protecting persons over forty years old from disparate treatment). Section 1983 reads, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1967) (prohibiting civil rights violations).

185. 365 U.S. 167 (1961).

186. *Id.* at 177-78 (quoting various lawmakers' testimony regarding the lack of state enforcement of the Fourteenth Amendment's provisions). Section 1983 was originally § 1 of the Klu Klux Klan Act of 1871. *Id.* at 171 (relating the historical underpinnings of § 1983). Section 1983 was the Congressional response to the continued constitutional violations committed by state and local authorities. *Id.* at 174 (categorizing § 1983 as an enforcement mechanism to ensure civil rights protection).

187. *Id.* at 180 (concluding that Congress in enacting § 1983 meant to provide a remedy for persons "deprived of constitutional rights, privileges and immunities"); 42 U.S.C. § 2000e, et seq. (1994) (declaring the purpose, in part, of Title VII "to authorize . . . suits to protect constitutional rights"); 29 U.S.C. § 621 (1994) (protecting persons from disparate treatment).

188. *Duggan v. Bd. of Educ.*, 818 F.2d 1291, 1294 (1987) (noting that "both [Title VII and ADEA] provide for parallel or overlapping administrative and judicial remedies, and both ultimately favor judicial resolution of disputed factual issues.").

189. *Monroe*, 365 U.S. at 180 (recognizing as "abundantly clear" the legislative desire to provide alternative federal jurisdiction in light of the "prejudice, passion, neglect [and] intolerance" regarding enforcement at the state level).

In *University of Tennessee v. Elliott*,<sup>190</sup> the Court relied heavily on the decision in *United States v. Utah Construction Co.*<sup>191</sup> to formulate its rules of preclusion.<sup>192</sup> There is a strong argument that the *Elliott* Court should have relied on *McDonald v. City of West Branch*<sup>193</sup> rather than *Utah Construction*.<sup>194</sup> The Supreme Court's holding in *McDonald*, that an arbitration of a § 1983 claim did not preclude a subsequent federal suit, was a recognition that the arbitration was not an "adequate substitute" for a judicial proceeding.<sup>195</sup> Such an assertion echoes the notion that preclusion cannot (or at least, should not) occur when there is a marked disparity between the two possible forums. The *McDonald* decision and the commentator's argument both implicitly recognize the likelihood that a state administrative agency determination will lack the procedural safeguards of its federal judicial counterpart.<sup>196</sup>

### VIII. CONCLUSION

The common thread running through all civil rights legislation is the preservation and protection of individual Constitutional guarantees.<sup>197</sup> Though at first glance a potentially simplistic observa-

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190. 478 U.S. 788 (1986).

191. 384 U.S. 394 (1966).

192. *Elliott*, 478 U.S. at 797 (recognizing the soundness of the principles advanced in *Utah Construction*).

193. 466 U.S. 284 (1984).

194. *Morris*, *supra* note 23, at 208 (offering *McDonald* as a preferable basis for preclusion due to *McDonald*'s requirement that a state administrative hearing serve as an adequate substitute for a federal proceeding before denying subsequent claim). In *McDonald*, the Court addressed the advisability of giving preclusive effect to a judicially unreviewed § 1983 decision of an arbitrator. *McDonald*, 466 U.S. at 292 (refusing to fashion a federal common-law rule of preclusion for arbitration determinations). Had *Elliott* undergirded its analysis with the logic of *McDonald*, the resulting rubric for determining whether to apply preclusion principles to unreviewed state administrative agency decisions would have required examination of both administrative procedural deficiencies and the expertise of the state agency in the disputed area. *Morris*, *supra* note 23, at 250 (predicting what use of *McDonald* would have meant to the *Elliott* decision).

195. *McDonald*, 466 U.S. at 290-91 (stressing the lack of expertise arbitrators possess regarding complex § 1983 legal questions).

196. *Accord McDonald v. City of W. Branch*, 466 U.S. 284, 291-92 (1984) (refusing to grant preclusive effect to arbitration decision due to the severely limited procedural protections); *Morris*, *supra* note 23, at 205 (suggesting that had *Elliott* followed the *McDonald* analysis, federal courts would be required to first examine the adjudicatory procedure used).

197. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) (declaring that Title VII was enacted to assure equal protection concerning employment opportunities); *Oscar Mayer*, 441 U.S. at 756 (emphasizing the common purpose shared by the



tion, this commonality is by far the most compelling and the most obvious reason to treat § 1983, Title VII, and the ADEA alike in terms of claim preclusion. Title VII repeatedly recognizes providing claimants the opportunity for a trial de novo, even after adjudication by a state administrative body, provided the agency decision has not been subjected to judicial review.<sup>198</sup> The ADEA, both in language and in spirit, not only echoes, but in certain instances, duplicates Title VII, and should enjoy identical *res judicata* treatment.<sup>199</sup> Section 1983 requires a slightly different analysis, which lead the *Elliott* Court to fall back on federal common-law principles when using preclusion to restrict a claimant's choice of forums. The Court in *Elliott* implicitly refused to base its inferences solely on the absence of legislative language, strengthening its holding by invoking its ability to create federal common-law.<sup>200</sup> The *Elliott* Court's dependency on federal common-law authority is ultimately unconvincing. As originally conceived, federal courts were restricted in their ability to create common-law in only those in-

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ADEA and Title VII of eliminating discrimination); *Monroe*, 365 U.S. at 180 (announcing that the purpose of § 1983 and other post-Civil War statutes was to protect federal constitutional rights).

It is abundantly clear that one reason the [§ 1983] legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

*Monroe v. Pape*, 365 U.S. 167, 180 (1961) (interpreting the legislative history and purpose behind the Civil Rights Act of 1871). *See also* *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) (noting that "one strong motive" behind passage of § 1983 was the "grave congressional concern that the state courts had been deficient in protecting federal rights"); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (observing that the Civil Rights Act of 1866 served as the template for § 1983, with its express purpose to enforce the Fourteenth Amendment). *Cf. Briscoe v. LaHue*, 460 U.S. 325, 338 (1983) (noting that another motivation behind passage of § 1983 was the prevention of conspiracies to commit perjury in order to exculpate fellow Klansmen).

198. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796 (1986) (upholding Sixth Circuit ruling that unreviewed state administrative determinations do not have preclusive effect on claims brought under Title VII); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) (finding preclusion of Title VII state administrative adjudication in light of the state court judgment affirming the agency's findings); *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (confirming Congressional intent to allow a trial de novo to federal Title VII claims).

199. *Oscar Mayer*, 441 U.S. at 755-56 (noting that the language pertaining to the authority of state agencies to remedy Title VII and ADEA claims is "virtually *in haec verba*", suggesting that ADEA treatment follow that of Title VII). *Accord* *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-11 (1991) (using established Title VII construction to interpret the ADEA's preclusion language and intent).

200. *Elliott*, 478 U.S. at 796.

stances where an important right was lacking an enforcement mechanism. Acting under the auspices of federal common-law authority, the Supreme Court has actually decreased the amount of enforcement ability available to the guaranteed protection by § 1983. The effects of allowing claim preclusion in § 1983 cases in an impermissible exercise of the otherwise tightly restricted common-law created authority enjoyed by federal courts. Instead, as urged by Justice Stevens, the *Elliott* Court and those jurisdictions following the *Stillians* line of decisions should more closely examine the broader intent behind each of the statutes in question and allow the greatest opportunity for enforcement.

Although there are certainly instances where state administrative agencies are not only adequate, but appropriate forums in which to settle controversies, civil rights merit far greater protective measures than can be provided by state agencies. The ability agencies have to perform executive, legislative, and judicial functions indicates the agency's almost certain inability to preserve and protect the most sacred of constitutional guarantees. State administrative adjudications are not intended to replace their more formal judicial counterparts, and consequently will continue to lack the necessary safeguards envisioned by the drafters of civil rights legislation. These inherent inadequacies, and the paramount common missions of Title VII, ADEA, and § 1983, prohibit preclusion of state administrative agency findings in subsequent federal suits.

